

CS

SUPER LAW GROUP, LLC

July 11, 2017

Via Certified Mail, Return Receipt Requested

Titan Concrete Inc.
4151 Boston Road
Bronx, NY 10466

Titan Concrete Inc.
2371 Exterior Street
Bronx, NY 10468

Michael Saccente Jr.
4151 Boston Road
Bronx, NY 10466

Re: Notice of Violation and Intent to File Suit under the Clean Water Act and the Resource Conservation and Recovery Act

To Whom It May Concern:

We are writing on behalf of Riverkeeper, Inc., ("Riverkeeper")¹ to notify you of Riverkeeper's intent to file suit against Titan Concrete Inc., and Michael Saccente Jr. (collectively, "Titan"), pursuant to Section 505(a) of the federal Clean Water Act ("CWA") and Section 7002(a)(1) of the Resource Conservation Recovery Act ("RCRA") for violations of the CWA and RCRA respectively.

Riverkeeper intends to file suit, as an organization and on behalf of its adversely affected members, in the United States District Court for the Southern District of New York seeking appropriate equitable relief, civil penalties, and other relief no earlier than 60 days from the date that Titan receives this letter.²

Riverkeeper intends to take legal action because Titan is discharging polluted stormwater to the Harlem River, a water of the United States, without a CWA permit at the Titan facility, located at the north end of Exterior Street, Bronx, NY 10468, adjacent to 2371 Exterior Street, ("the Facility"). For clarity, the Facility location can be uniquely identified by tax block and lot number as block 3244, Lot 145 and 160 in Bronx County. These discharges violate Sections

¹ Riverkeeper, Inc. is a not-for-profit environmental organization existing under the laws of the state of New York, headquartered in Ossining, New York. Riverkeeper's mission includes safeguarding the environmental, recreational and commercial integrity of the Hudson River and its ecosystem, as well as the watersheds that provide New York City with its drinking water. Riverkeeper achieves its mission through public education, advocacy for sound public policies and participation in legal and administrative forums. Riverkeeper has more than 4,500 members, many of whom reside near to, use and enjoy the Hudson River and the waters and tributaries of New York Harbor, including the Harlem River, Newtown Creek, Coney Island Creek, Jamaica Bay, Westchester Creek and the Gowanus Canal.

² See 40 C.F.R. § 254.2(c) (notice of intent to file suit is deemed to have been served on the date noted on the receipt card).

301(a) and 402(p)(2)(B) of the Clean Water Act.³ Further, Titan has not applied for coverage under, nor complied with the conditions of, an individual National Pollutant Discharge Elimination System ("NPDES") permit or the General Permit for the Discharge of Stormwater Associated with Industrial Activity ("General Permit")⁴ issued by the New York State Department of Environmental Conservation ("DEC"), in violation of Sections 402(p), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

Moreover, Titan discharges pollution into the Harlem River without a permit in violation of Section 301(a) of the CWA by depositing large cement blocks and other waste and industrial materials on the banks of the Harlem River such that they break apart and discharge into the river.

In addition, Titan is engaged in open dumping at the Facility and has used the Harlem River and its shoreline as an open dump in violation of RCRA Section 4005(a)⁵ and 40 C.F.R. § 257.

I.

BACKGROUND

With every rainfall event, hundreds of millions of gallons of polluted rainwater pour into New York Harbor, the Hudson River, the East River, Long Island Sound, and other receiving waters. The consensus among agencies and water quality specialists is that stormwater pollution accounts for more than half of the total pollution entering the marine environment each year.

DEC has designated more than 7,000 river miles, 319,000 acres of larger waterbodies, 940 square miles of bays and estuaries, and 592 miles of Great Lakes shoreline in the State as "impaired," or not meeting water quality standards, and unable to support beneficial uses such as fish habitat and water contact recreation.⁶ For the overwhelming majority of water bodies listed as impaired, stormwater runoff is cited as a primary source of the pollutants causing the impairment. Contaminated stormwater discharges can and must be controlled in order to improve the quality and health of these waterbodies.

Stormwater discharges flow from the Facility directly into the Harlem River via the western edge of the Facility. Stormwater also flows from the Facility to Exterior Street and then through several conveyances is discharged into the Harlem River. DEC has classified the Harlem River

³ 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).

⁴ New York State Department of Environmental Conservation, *SPDES Multi-Sector General Permit For Stormwater Discharges Associated With Industrial Activity*, Permit No. GP-0-12-001, (hereinafter "General Permit"), available at <http://www.dec.ny.gov/chemical/9009.html>. This General Permit replaces earlier general permits for the discharge of stormwater associated with industrial activity. It became effective on October 1, 2012, and will expire on September 30, 2017.

⁵ 42 U.S.C. § 6945(a).

⁶ See EPA, Watershed Assessment, Tracking and Environmental Results, New York Assessment Data for 2012, http://ofrnpub.epa.gov/waters10/atains_state.report_control?p_state=NY&p_cycle=2012&p_report_type=A (last visited Oct. 14, 2014).

as a class “I” waterbody.⁷ Under New York’s Water Quality Standards, a waterbody that is designated as “I” is best suited for secondary contact recreation and fishing uses.⁸ “I” waters should be suitable for fish, shellfish, and wildlife propagation and survival. In addition, “I” waters shall be suitable for primary contact recreation. The New York Water Quality Standards also set numeric and narrative criteria for different water pollution parameters including dissolved oxygen, oil and grease, suspended and settleable solids, bacteria (pathogens), pH, temperature, nutrients, and others. A waterbody must meet these numeric and narrative criteria in order to support its designated uses.⁹

The Harlem River consistently fails to meet state water quality standards.¹⁰ DEC has designated the Harlem River as impaired pursuant to Section 303(d) of the CWA¹¹ for failure to meet minimum water quality standards due to the presence of PCBs, mercury, dioxins/furans, PAHs, pesticides, other heavy metals and toxics.¹²

Stormwater discharges from the Facility introduce a host of industrial pollutants into the Harlem River. The CWA provides a regulatory regime for mitigating the worst impacts of industrial stormwater pollution, but Titan’s Facility is not in compliance with the basic requirements of that regime.

II.

STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED AND ACTIVITIES ALLEGED TO BE VIOLATIONS

A. Titan is Discharging Stormwater Associated with Industrial Activity to Waters of the United States without a Permit.

The CWA prohibits the discharge of pollutants to the waters of the United States except in accordance with a valid NPDES permit.¹³ Titan’s industrial activity at the Facility has caused and continues to cause a “discharge of pollutants” within the meaning of Section 502(12) of the CWA¹⁴ and a “stormwater discharge associated with industrial activity” within the meaning of 40 C.F.R. § 122.26(b)(14) from the Facility on each and every day that there has been a rain event of more than 0.1 inches.¹⁵

⁷ See 6 N.Y.C.R.R. § 890.6.

⁸ See 6 N.Y.C.R.R. § 701.13.

⁹ See 6 N.Y.C.R.R. §§ 702, 703.

¹⁰ See *Proposed Final New York State 2016 Section 303(d) List of Impaired Waters Requiring a TMDL/Other Strategy*, available at http://www.dec.ny.gov/does/water_pdf/303dproplist2016.pdf (hereinafter “303(d) List”) at 33.

¹¹ 33 U.S.C. § 1313(d).

¹² See 303(d) List at 20-21.

¹³ See CWA §§ 301(a) and 402.

¹⁴ 33 U.S.C. § 1362(12).

¹⁵ EPA has determined that precipitation greater than 0.1 inches in a 24-hour period constitutes a measurable precipitation event for the purposes of evaluating stormwater runoff associated with industrial activity. See, e.g., 40 C.F.R. § 122.26(c)(1)(E)(6) (using 0.1 inches as the distinguishing threshold of a storm event).

Notice of Violation and Intent to File Suit

July 11, 2017

Page 4 of 17

The Facility has exposed and continues to expose industrial pollutants to stormwater, at a minimum, (a) by receiving, storing, processing, cutting and transporting concrete, sand, aggregate, stone, Portland cement and other materials outside or otherwise exposing them to the elements, and (b) from vehicles entering and leaving the Facility that track pollutants off site. During precipitation events (including runoff from rainfall and snow or ice melt events), pollutants are carried away from the Facility in stormwater discharges.

Titan's activities at the Facility include but are not limited to the purchase, collection, processing, cutting, and outdoor storage, of sand, aggregate, stone, Portland cement, and other substances used in manufacturing, loading, and delivering ready mix concrete. Upon information and belief, the Facility houses a ready mix concrete plant, truck washing equipment, and materials piles that are all potential sources of industrial pollutants. Titan mixes raw materials into concrete on site, transfers the concrete to trucks, washes out trucks at the Facility, and stores a variety of finished concrete products, other building materials, and open containers on site, exposed to stormwater.

In carrying out these activities at the Facility, Titan stores and handles materials in a manner that exposes them to precipitation and snowmelt. In particular, raw materials piles, machinery, and trucks that have completed their deliveries can release pollutants onto the Facility property including aggregate, sand, Portland cement, cement additives, waste materials reused in concrete manufacture and other minerals such as shale, clay, limestone, slate, slag, pumice, fly ash, baghouse settled dust, oil and grease. If specialty concretes or cast/formed products are demanded by a customer, the Facility may also house form release agents, latex sealants, and bitumastic coatings. All of these wastes can release solids that suspend or dissolve in stormwater, lead, iron, zinc, oil and grease, oxygen-demanding and pH-altering pollutants into the Harlem River.¹⁶

In addition, machinery on the site may release fuel, oil, lubricants, PCBs, PAHs, an array of metals, pH-affecting substances and chemical residue. These toxic pollutants can be generated in forms ranging from spilled liquid to small particulate matter, which settles on the ground and other surfaces that are exposed to stormwater and non-stormwater flows. Also, vehicles at the Facility may expose many other pollutants to the elements, including gasoline, diesel fuel, anti-freeze, and hydraulic fluids.

At the Facility, there is a concrete block wall along the western edge of the site adjacent to the Harlem River. Riverkeeper has evidence of Titan storing various industrial materials related to the manufacturing of concrete on top of the concrete wall, and among the blocks making up the wall.

Because Titan fails to adequately shelter and otherwise contain these materials to prevent their release to the environment, precipitation falls on and flows over exposed materials, fluids, and

¹⁶ See EPA, "Industrial Stormwater Fact Sheet Series, Sector E: Glass, Clay, Cement, Concrete, and Gypsum Product Manufacturing Facilities," available at http://water.epa.gov/polwaste/npdes/stormwater/upload/sector_e_glass.pdf (last visited Sept. 15, 2014).

particulates. During precipitation events, all of the above-mentioned industrial pollutants mix with stormwater and are discharged directly into the Harlem River.

The Harlem River is a “water of the United States,” as defined in 40 C.F.R. § 122.2 and, therefore a, “navigable water” as defined in Section 502(7) of the CWA. Titan does not have a NPDES permit for these discharges of pollutants. Thus, Titan is discharging polluted industrial stormwater into navigable waters of the United States without the permit required under Sections 301 and 402 of the CWA.

B. Titan is Discharging Truck Wash Water – a Type of Industrial Wastewater - to Waters of the United States without a Permit.

Titan operates a fleet of concrete ready-mix delivery trucks. At times, Titan washes its concrete trucks outside the boundary of the Facility, on Exterior Street, before moving them down the street to be parked offsite. This truck wash water flows down Exterior Street and part of it flows onto the property of other landowners. Riverkeeper believes that this truck wash water is conveyed by different paths to the Harlem River.

Truck wash water is a process wastewater, a type of polluted, non-stormwater discharge that is not eligible for coverage under the General Permit. Therefore, Titan’s failure to obtain and comply with an individual NPDES permit for such discharges violates CWA §§ 301(a) and 402(p). Titan must either terminate all discharges of truck wash water or obtain coverage for these discharges under an individual NPDES permit.

C. Titan is Violating the Clean Water Act by Failing to Apply for NPDES Permit Coverage.

Titan is engaged in the business of manufacturing concrete. Accordingly, Titan is an industrial discharger with a primary Standard Industrial Classification (“SIC”) Code of 3273, which is an industrial activity included in Sector E of the General Permit. Pursuant to Section 402(p) of the CWA and regulations promulgated by EPA pursuant to the CWA, Titan must apply for coverage under the General Permit or an individual NPDES permit for Titan’s discharge of polluted stormwater. In addition, Titan must apply for an individual NPDES permit if the Facility is discharging process wastewater, or has any other non-stormwater discharge containing pollutants that is not authorized by the General Permit (for example, truck washwater is a non-stormwater discharge that is not eligible for coverage under the General Permit). By failing to apply for coverage under the General Permit or an individual permit, Titan is violating CWA Sections 301(a) and 402(a) and (p) and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).¹⁷

¹⁷ Sections 301(a) and 402(a) and (p) make it unlawful for Titan to discharge stormwater associated with industrial activity without obtaining a NPDES permit. 40 C.F.R. Sections 122.26(c)(1) and (e)(1) require Titan to apply for a NPDES permit that covers its discharge of stormwater associated with industrial activity.

To be eligible to discharge stormwater associated with its industrial activities under the General Permit, Titan must submit to DEC a registration form called a "Notice of Intent."¹⁸ Notice of Intent forms are available online from DEC.¹⁹ To register, Titan is required, among other things, to list all stormwater discharges, to describe each of the industrial activities taking place in the drainage area of each discharge and the acreage of industrial activity exposed to stormwater, the immediate surface water body or wetland to which site runoff discharges, and the name of the watershed and nearest waterbody to which the site ultimately discharges and information about whether the receiving waters are impaired.²⁰ Titan has failed to prepare and file a Notice of Intent or an application for an individual permit.²¹

D. Titan Scrap is Violating the Clean Water Act by Failing to Comply with the General Permit.

As a discharger of stormwater associated with industrial activity, Titan must comply at all times with the requirements of the General Permit (or an individual permit).²² By discharging stormwater associated with industrial activity at both Facilities, without complying with the General Permit, Titan is violating CWA Sections 301(a) and 402(a) and (p).²³ The main General Permit requirements that Titan has failed and continues to fail to meet are explained further below.

1. Titan has not developed and implemented a Stormwater Pollution Prevention Plan at the Facility.

Before submitting a registration form, Titan must prepare, make available, and implement a Stormwater Pollution Prevention Plan ("SWPPP") in accordance with schedules established in the General Permit.²⁴ The SWPPP must identify potential sources of pollution that may affect

¹⁸ See General Permit, Part I.E.3. In notifying Titan that the Clean Water Act requires coverage under and compliance with a valid NPDES permit in order to lawfully discharge, and that submission of a Notice of Intent to DEC is required in order to obtain coverage under the General Permit, Riverkeeper does not concede that all of the activities conducted at the Facilities are necessarily eligible for coverage under that permit. For example, if a Facility is discharging process wastewater, such as wash water, or has any other polluted non-stormwater discharge that is not authorized by the General Permit, then an individual NPDES permit is required and the failure to obtain and comply with an individual NPDES permit for such discharges also violates CWA §§ 301(a) and 402(p). The conditions for eligibility to discharge under the General Permit are provided in Part I.C of the permit.

¹⁹ See http://www.dec.ny.gov/docs/water_pdf/gpnoi.pdf.

²⁰ See Division of Water, NY DEC, *Notice of Intent For Stormwater Discharges Associated with Industrial Activity under the State Pollutant Discharge Elimination System (SPDES) Multi-Sector General Permit GP-0-12-001 (MSGP)* (2012), available at http://www.dec.ny.gov/docs/water_pdf/gpnoi.pdf.

²¹ A thorough search of EPA's Enforcement & Compliance History Online ("ECHO") database and DEC's records reveals that no Notice of Intent has been submitted for the Facility.

²² This section discusses the compliance requirements of the General Permit. If Titan elects to seek coverage under individual NPDES permits instead, the conditions of those individual permits will be at least as strict as those of the General Permit, thus Titan will still be required to comply with all of the following.

²³ Sections 301(a) and 402(a) and (p) make it unlawful for Titan to discharge stormwater associated with industrial activity without first complying with all of the conditions established in a NPDES permit.

²⁴ See General Permit Part III.B.

the quality of stormwater discharges associated with industrial activity. Further, the SWPPP must describe and ensure the implementation of practices that minimize the discharge of pollutants in these discharges and that assure compliance with the other terms and conditions of the General Permit, including achievement of effluent limitations.²⁵

Among other things, the SWPPP must include: a general site description, a general location map identifying the location of the facility and all receiving waters to which stormwater discharges, information related to a company stormwater pollution prevention team, a summary of potential pollutant sources, a description of control measures and best management practices, and schedules and procedures for implementation of control measures, monitoring and inspections.²⁶

Titan has not developed and implemented a legally compliant SWPPP for the Facility, as required by Part III of the General Permit.²⁷

2. Titan has not implemented control measures and best management practices that are selected to meet best available technology standards.

Titan cannot legally discharge stormwater under the General Permit from the Facility until Titan implements mandatory general and sector-specific control measures called Best Management Practices (“BMPs”) in order to minimize the discharge of pollutants from the Facility.²⁸ The selected measures must reduce the discharge of pollution from each Facility to the extent practicable through use of the best available technology for the industry.

The General Permit requires that “[t]he owner or operator must select, design, install, and implement control measures (including best management practices),” in accordance with good engineering practices, to meet the effluent limits contained in the permit.²⁹ The General Permit’s effluent limits include both numeric limits specific to certain sectors³⁰ and non-numeric technology-based effluent limits that apply to all facilities.³¹ These non-numeric technology-based restrictions include minimizing the exposure of pollutants to stormwater³² and minimizing the discharge of pollutants in stormwater³³ “to the extent achievable using control measures

²⁵ See General Permit Part III.A.

²⁶ See General Permit Part III.C.

²⁷ Riverkeeper believes no SWPPPs exist. If a SWPPP exists at the Facility, then it is either facially inadequate or has not been fully and adequately implemented.

²⁸ See General Permit Part I.B.1, *see also* Part VII (setting forth sector-specific control measures and practices).

²⁹ General Permit Part I.B.1.a. *See also* Part III.C.7 (“The SWPPP must document the location and type of BMPs installed and implemented at the facility to achieve the non-numeric effluent limits in Part I.B.1.a.(2) and where applicable in Part VIII, and the sector specific numeric effluent limitations in Part VIII.”).

³⁰ See General Permit, Part VIII.

³¹ See General Permit, Part I.B.1.a.2.

³² See General Permit, Part I.B.1.a.2.a.

³³ See General Permit, Part I.B.1.a.2.f.

(including best management practices) that are technologically available and economically practicable and achievable in light of best industry practice.”³⁴

Titan has not minimized the discharge of pollution to the extent achievable by implementing control measures or BMPs that are technologically achievable and economically practicable and achievable in light of best industry practice, as required by Parts I.B.1 and VIII of the General Permit.

3. Titan has not conducted routine site inspections or complied with monitoring, recordkeeping, and reporting requirements at the Facility.

Titan must conduct an annual comprehensive site inspection and evaluation of areas where industrial materials or activities are exposed to precipitation or where spills and leaks have occurred within the past three years.³⁵ The inspection must ensure that all stormwater discharges are adequately controlled and that all BMPs are functioning as expected.³⁶ Records of this inspection must be kept for five years.³⁷

In addition, qualified facility personnel must carry out routine inspections at least quarterly.³⁸ During these inspections, personnel must evaluate conditions and maintenance needs of stormwater management devices, detect leaks and ensure the good condition of containers, evaluate the performance of the existing stormwater BMPs described in the SWPPP, and document any deficiencies in the implementation and/or adequacy of the SWPPP.³⁹ Such deficiencies must then be addressed through corrective actions.

The General Permit requires that all covered facilities conduct multiple types of analytical monitoring, and DEC may require additional individualized monitoring as well.⁴⁰ In particular, all facilities authorized under the General Permit must:

- collect and analyze stormwater samples for each outfall at least annually;⁴¹
- conduct visual monitoring of stormwater discharges at least quarterly;⁴²
- perform an annual dry weather inspection to detect non-stormwater discharges;⁴³

³⁴ See General Permit, Part I.B.1 (“In the technology-based limits included below and in Part VIII, the term ‘minimize’ means reduce and/or eliminate to the extent achievable using control measures (including best management practices) that are technologically available and economically practicable and achievable in light of best industry practice.”).

³⁵ See General Permit, Part IV.A.1.

³⁶ See General Permit, Part IV.A.1.

³⁷ See General Permit, Part IV.A.2.

³⁸ See General Permit, Part III.C.7.b.2.

³⁹ See General Permit, Part III.C.7.b.1 and b.3.

⁴⁰ See General Permit, Part IV.B.3.

⁴¹ See General Permit, Part IV.B.1.e (requiring at least annual collection and analysis of stormwater samples). See General Permit, Part IV.B.1.d, .e, .f, and .g for obligations to sample more frequently.

⁴² See General Permit, Part IV.B.1.a.

⁴³ See General Permit, Part IV.B.1.b.

- inspect, sample and monitor discharges from coal pile runoff;⁴⁴
- inspect, sample and monitor discharges from secondary containment structures and transfer areas;⁴⁵
- document storm events during which any samples are taken;⁴⁶
- document all of these monitoring activities;⁴⁷
- keep records of the monitoring with the Facility's SWPPP;⁴⁸ and
- submit an annual report to DEC accompanied by a Discharge Monitoring Report detailing the results of all required stormwater samples, as well as reports that documents any instance of non-compliance with benchmarks or numeric effluent limitations.⁴⁹

Because Titan is engaged in industrial activities associated with ready mix concrete production, it is required to sample for:

- Total suspended solids
- pH
- Total Recoverable Iron⁵⁰

Riverkeeper is not necessarily aware of all industrial activities taking place at the Facility. To the extent that industrial activities other than the above is carried out at the Facility, other sampling may be required as well.⁵¹ This notice provides Titan with sufficient information to identify the standards and limitations that apply to all categories of industrial activity.

Titan has failed to conduct the required annual and other routine inspections, monitoring, and testing, as required by, at least, Parts III, IV, and VIII of the General Permit. Titan also has failed to retain records and submit monitoring reports to DEC pertaining to the Facility, as required by, at least, Parts IV and VIII of the General Permit.

4. Titan has failed to comply with additional requirements located in Part VIII of the General Permit.

As noted above, the General Permit contains various requirements specific to ready mix concrete facilities. These requirements, some of which are referenced above, are collected in Part VIII of the General Permit. They include:⁵²

⁴⁴ See General Permit, Part IV.B.1.d.

⁴⁵ See General Permit, Part IV.B.1.f.

⁴⁶ See General Permit, Part IV.B.2.c.

⁴⁷ See, e.g., General Permit, Parts IV.B.1.a.8, IV.B.1.b.4, IV.B.1.c.9. *see generally* Part IV.E.

⁴⁸ See General Permit, Part IV.E.

⁴⁹ See General Permit, Part IV.B.1 and 2 and Part IV.C.

⁵⁰ See General Permit, Part VIII, Sector E.

⁵¹ See General Permit, Part VIII.

⁵² See General Permit, Part VIII, Sector E.

- A requirement to include in your SWPPP and annual reports to DEC a description of measures that ensure that process wastewater that results from washing of trucks, mixers, transport buckets, forms or other equipment are discharged in accordance with a separate SPDES permit or are recycled.
- A requirement to identify in your SWPPP the locations of the following, if applicable:
 - Bag house or other dust control device;
 - Recycle/sedimentation pond, clarifier or other device used for the treatment of process wastewater and the areas that drain to the treatment device.
- A requirement that your site inspections shall take place while the Facility is in operation and shall include all of the following areas that are exposed to stormwater:
 - Material handling areas
 - Aboveground storage tanks
 - Hoppers or silos,
 - Dust collection/containment systems
 - Truck wash down/equipment cleaning areas
- A requirement to sweep the Facility weekly to prevent or minimize the discharge of cement and aggregate.
- A requirement to, if practicable, store cement and any other fine granular solids in enclosed silos or hoppers, buildings, or under other covering.

Titan has failed to comply with the additional requirements of Part VIII of the General Permit.

5. Titan is Clearly Violating the Clean Water Act.

In sum, Titan's discharge of stormwater associated with industrial activities without a permit, Titan's failure to apply for permit coverage, and Titan's failure to comply with the above-listed conditions of the General Permit (or individual NPDES permit) constitute violations of the General Permit and of Sections 301(a) and 402(p) of the Clean Water Act.

E. Titan is Violating the Clean Water Act by Discharging Pollution into The Harlem River Without A Permit by Depositing Concrete Blocks, Waste Material, and Aggregate in the Waterway.

CWA § 1311(a) prohibits "the discharge of any pollutant by any person" except in accordance with the terms of the CWA. Titan disposes of debris, waste, and other materials at the back of the Facility along the banks of the Harlem River. At the Facility, there is a concrete block wall along the banks of the Harlem River that is falling into the River. Large concrete blocks are deposited directly in the waterway, and the wall itself is crumbling into the River. Titan also

mishandles aggregate, causing it to overtop the concrete block wall and fall into the river. In addition, Titan has deposited piles of other waste materials that appear to be waste concrete or concrete construction debris and aggregate along the banks of the River and on top of the concrete wall. These materials are being released into the environment, including directly into the Harlem River. By releasing concrete blocks, aggregate, and other wastes associated with Facility into the River, Titan is discharging pollutants into a water of the United States without a permit in violation of CWA § 1311(a).

F. Titan is Violating the Resource Conservation Recovery Act by Engaging in Open Dumping at the Facility.

RCRA prohibits the open dumping of solid waste or hazardous waste and the operation of open dumps.⁵³ Pursuant to RCRA Sections 1008(a), 4004(a), and 4005, 42 U.S.C. §§ 6907(a), 6944(a), and 6945, the EPA promulgated criteria distinguishing sanitary landfills from open dumps and determining what actions constitute open dumping; the standards are at 40 C.F.R. Part 257. Any facility used for the disposal of solid or hazardous waste that does not meet EPA's standards is an illegal open dump.⁵⁴ Furthermore, any solid or hazardous waste disposal practices that are not in compliance with EPA's standards constitute open dumping.⁵⁵

RCRA and EPA regulations define "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters."⁵⁶ "Solid waste" is defined as "any garbage, refuse . . . and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities . . ."⁵⁷ "Hazardous waste" is "a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may-- (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed."⁵⁸

The concrete blocks, aggregate, and other waste materials discarded by Titan constitute solid waste.

⁵³ See RCRA Section 4005(a), 42 U.S.C. § 6945(a).

⁵⁴ See 40 C.F.R. §§ 257.1 (a)(1) ("Facilities failing to satisfy [the criteria of Part 257] are considered open dumps, which are prohibited under section 4005 of the Act."), 257.2 ("Open dump means a facility for the disposal of solid waste which does not comply with [Part 257]."). A facility is simply any "land and structures, other appurtenances, and improvements on the land used for the disposal of solid waste." *Id.*

⁵⁵ See 40 C.F.R. § 257.1 (a)(2) ("Practices failing to satisfy [the criteria of Part 257] constitute open dumping, which is prohibited under section 4005 of the Act.").

⁵⁶ 42 U.S.C. § 6903(3); 40 C.F.R. § 257.2.

⁵⁷ 42 U.S.C. § 6903(27); 40 C.F.R. § 257.2.

⁵⁸ 42 U.S.C. § 6903(5).

To comply with RCRA, a solid waste disposal facility must meet certain criteria. First, “[f]acilities or practices in floodplains shall not restrict the flow of the base flood, reduce the temporary water storage capacity of the floodplain, or result in washout of solid waste, so as to pose a hazard to human life, wildlife, or land or water resources.”⁵⁹

The Facility is located directly on the banks of the Harlem River. Titan has dumped solid waste into the River and along the banks of the Harlem River, by dumping large concrete blocks, aggregate, and other concrete or construction waste directly into the River and along the banks of the River. This dumping takes place in the area of the Facility that is effected by the tides. The material both reduces the water storage capacity of the floodplain and poses a risk of washout.

Second, the “facility shall not cause a discharge of pollutants into waters of the United States that is in violation of the requirements of the National Pollutant Discharge Elimination System (NPDES) under section 402 of the Clean Water Act, as amended.”⁶⁰ As described above, by allowing waste materials dumped adjacent to the Harlem River to fall into the waterway and by dumping waste materials directly into the waterway, Titan is discharging pollutants from a point source to the Harlem River without a NPDES permit, and thus is also violating the CWA.

Lastly, the “facility shall not allow uncontrolled public access so as to expose the public to potential health and safety hazards at the disposal site.”⁶¹ The Facility is operating on the banks of a public waterway. Riverkeeper’s members use the waterway for canoeing and kayaking and can directly access the Facility and the disposal site. The Facility is thus regularly exposing the public to potential health and safety hazards.

In sum, Titan’s activities at the Facility violates the federal open dumping criteria because, at a minimum, Titan is (1) disposing of waste in the floodplain, (2) dumping waste directly into the Harlem River, and (3) allowing uncontrolled public access to the disposal site via Harlem River, a public waterway. Therefore, Titan is violating RCRA’s prohibition against open dumping. This disposal of solid waste poses a reasonable probability of adverse effects on human health and the environment. Titan is engaging in the disposal of solid and/or hazardous waste by discharging, depositing, and placing discarded material on the shore of Harlem River and into the River itself in violation of RCRA and EPA regulations.⁶²

Riverkeeper intends to sue Titan as the owner and operator of the Facility, for maintaining an open dump in violation of EPA regulations promulgated in accordance with RCRA.⁶³ Titan’s ongoing disposal of solid and/or hazardous waste is illegal and subject to liability.⁶⁴

III.

⁵⁹ 40 C.F.R. § 257.3-1(a).

⁶⁰ 40 C.F.R. § 257.3-3(a).

⁶¹ 40 C.F.R. § 257.3-8(d).

⁶² 42 U.S.C. § 6945(a); 40 C.F.R. Part 257.

⁶³ 42 U.S.C. § 6945(a); 40 C.F.R. Part 257.

⁶⁴ 42 U.S.C. § 6972(a)(1)(b); 40 C.F.R. Part 257.

PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS

Titan Concrete, Inc. and Michael Saccente Jr. (collectively, "Titan") are the persons responsible for the violations alleged in this Notice. Riverkeeper believes that Titan has operational control over the day-to-day industrial activities at the Facility or owns the underlying property at which the Facility is located. Therefore, Titan is responsible for managing stormwater at the Facility in compliance with the CWA and ensuring compliance with RCRA. Riverkeeper hereby puts Titan on notice that if Riverkeeper subsequently identifies additional persons as also being responsible for the violations set forth above, Riverkeeper intends to include those persons in this action.

IV.

LOCATION OF THE ALLEGED VIOLATION

The violations alleged in this Notice have occurred and continue to occur at the Facility located at the north end of Exterior Street, Bronx, NY 10468, adjacent to 2371 Exterior Street, Bronx, NY 10468, as well as along Exterior Street and in the Harlem River. For clarity, the Facility location can be uniquely identified as Block 3244, Lot 145 and 160 in Bronx County.⁶⁵

V.

DATES OF VIOLATION

Every day upon which Titan has failed to apply for permit coverage since it first commenced operations at the Facility and discharged polluted stormwater is a separate violation of Sections 301(a) of the CWA and EPA's regulations implementing the CWA.⁶⁶ These days of violation have continued consecutively for at least five years, by which time Riverkeeper believes Titan has owned or was operating the Facility.

Additionally, Titan has discharged from the Facility without a permit in violation of Section 301(a) of the CWA on every day since Titan commenced operations at the Facility on which there has been a measurable precipitation event or discharge of previously accumulated precipitation (i.e., snowmelt) over 0.1 inches.

⁶⁵ The federal courts have held that a reasonably specific indication of the area where violations occurred, such as the name of the facility, is sufficient and that more precise locations need not be included in the notice. *See, e.g., Natural Resources Defense Council v. Southwest Marine, Inc.*, 945 F. Supp. 1330, 1333 (S.D. Cal. 1996), *aff'd* 236 F.3d 985, 996 (9th Cir. 2000); *City of New York v. Anglebrook Ltd. Partnership*, 891 F. Supp. 900, 908 (S.D.N.Y. 1995); *Assateague Coastkeeper v. Alan & Kristin Hudson Farm*, 727 F. Supp. 2d 433, 439 (D. Md. 2010); *United Anglers v. Kaiser Sand & Gravel Co.*, No. C 95-2066 CW, 1995 U.S. Dist. LEXIS 22449 at *4 (N.D. Cal. Sept. 27, 1995).

⁶⁶ *See* 33 U.S.C. §§ 402(p)(3)(A) and (p)(4)(A) (requiring the establishment of industrial stormwater NPDES permits and of a permit application process).

Finally, if Titan seeks permit coverage for the Facility after receiving this letter but fails to fully comply with the requirements of the General Permit (or an individual permit), each day upon which Titan claims coverage under a NPDES permit but fails to comply with that permit will constitute a separate day of violation with respect to each unmet condition of that permit.

Titan is liable for the above-described violations occurring prior to the date of this letter and for every day after the date of this letter that these violations continue. In addition to the violations set forth above, this Notice covers all violations of the CWA evidenced by information that becomes available after the date of this Notice of Intent to File Suit.⁶⁷ These violations are ongoing, and barring full compliance with the permitting requirements of the CWA, these violations will continue.

VI.

RELIEF REQUESTED

Riverkeeper will ask the court to order Titan to comply with the CWA and RCRA, to pay penalties, and to pay Riverkeeper's costs and legal fees.

First, Riverkeeper will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act pursuant to Sections 505(a) and (d) and such other relief as permitted by law. Riverkeeper will seek an order from the Court requiring Titan to obtain NPDES permit coverage and to correct all other identified violations through direct implementation of control measures and demonstration of full regulatory compliance.

In addition, Riverkeeper will also seek injunctive relief under RCRA to prevent further violations of RCRA, to remove all the waste that Titan has illegally dumped in and around the Harlem River and its surrounding environment and to manage the Facility in a manner that prevents further RCRA violations pursuant to Section 7002(a).

Second, pursuant to Section 309(d) of the CWA,⁶⁸ each separate violation of the CWA subjects Titan to a penalty not to exceed \$37,500 per day for each violation that occurred prior to November 2, 2015, and up to \$52,414 per day for each violation that occurred after November 2, 2015. Riverkeeper will seek the full penalties allowed by law.

⁶⁷ See, e.g., *Public Interest Research Grp. v. Hercules, Inc.*, 50 F.3d 1239, 1248-49 (3d Cir.1995) (a notice that adequately identifies specific violations to a potential defendant also covers repeated and related violations that the plaintiff learns of later. "For example, if a permit holder has discharged pollutant 'x' in excess of the permitted effluent limit five times in a month but the citizen has learned only of four violations, the citizen will give notice of the four violations of which the citizen then has knowledge but should be able to include the fifth violation in the suit when it is discovered.").

⁶⁸ 33 U.S.C. § 1319(d); see also 40 C.F.R. § 19.4 (Adjustment of Civil Monetary Penalties for Inflation).

Third and lastly, pursuant to the CWA and RCRA, Riverkeeper will seek recovery of its litigation fees and costs (including reasonable attorney and expert witness fees) associated with this matter.⁶⁹

VII.

PERSONS GIVING NOTICE

The full name, address, and telephone number of the persons giving notice are as follows:

Riverkeeper, Inc.
20 Secor Road
Ossining, NY 10562
(914) 478-4501
Attn.: Sean Dixon

VIII.

IDENTIFICATION OF COUNSEL

Riverkeeper is represented by legal counsel in this matter. The name, address, and telephone number of Riverkeeper's attorneys are:

Edan Rotenberg, Esq.
Mike DiGiulio, Esq.
Super Law Group, LLC
180 Maiden Lane, Suite 603
New York, New York 10038
(212) 242-2355

IX.

CONCLUSION

The foregoing provides more than sufficient information to permit Titan to identify the specific standard, limitation, or order alleged to have been violated, the activities alleged to constitute violations, the person or persons responsible for the alleged violations, the locations of the alleged violation, the date or dates of such violations, and the full name, address, and telephone number of the person giving notice.⁷⁰

⁶⁹ 33 U.S.C. § 1365(d); 42 U.S.C. § 6972(e).

⁷⁰ 40 C.F.R. §§ 135.3(a), 254.3(a).

If Titan has developed a SWPPP for the Facility, Riverkeeper requests that Titan send a copy to the undersigned attorney.⁷¹ Otherwise, Riverkeeper encourages Titan to begin developing a SWPPP immediately after receiving this letter and ask that Titan to please inform the undersigned attorney of its efforts so Riverkeeper can work with Titan to avoid disputes over the contents of the SWPPP.⁷²

During the sixty-day notice period, Riverkeeper is willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of protracted litigation. If Titan wishes to pursue such discussions, please contact the undersigned attorney immediately so that negotiations may be completed before the end of the sixty-day notice period. We do not intend to delay the filing of a complaint in federal court, regardless of whether discussions are continuing at the conclusion of the sixty days.

Sincerely,



Mike DiGiulio, Esq.
Super Law Group, LLC
180 Maiden Lane, Suite 603
New York, New York 10038
(212) 242-2355, ext. 4

cc:

Scott Pruitt, Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Catherin R. McCabe, Acting EPA Region 2 Administrator
Environmental Protection Agency

⁷¹ Note that under Part III.D.2 of the General Permit, the owner or operator of a facility "must make a copy of the SWPPP available to the public within 14 days of receipt of a written request."

⁷² Riverkeeper will not send a new notice letter in response to any effort Titan makes to come into compliance with the Clean Water Act after receiving this letter, for example, by developing a SWPPP. The federal courts have held that citizens sending a notice letter are not required to identify inadequacies in compliance documents that do not yet exist and are "not required to send a second notice letter in order to pursue specific claims regarding the inadequacies of [a defendant's] post-notice compliance efforts." *WaterKeepers N. Cal. v. AG Indus. Mfg.*, 375 F.3d 913, 920 (9th Cir. 2004). See also *Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985, 997 (9th Cir. 2000) ("subject matter jurisdiction is established by providing a notice that is adequate on the date it is given to the defendant. The defendant's later changes . . . do not retroactively divest a district court of jurisdiction under 33 U.S.C. § 1365(b)."); *City of New York v. Anglebrook L.P.*, 891 F. Supp. 900, 908 (S.D.N.Y. 1995) (plaintiff's notice letter based on inadequacies of defendant's original SWPPP held sufficient to establish court's jurisdiction, even though defendant later prepared a revised SWPPP).

Notice of Violation and Intent to File Suit
July 11, 2017
Page 17 of 17

290 Broadway
New York, NY 10007-1866

Basil Seggos, Commissioner
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-1011

